Petition

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NO. _____

RAYMOND K. HORTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES A. MC PHERSON
Attorney for Petitioner
McPHERSON & ZAINEY
419 Carondelet Street
New Orleans, LA 70130
Telephone [504] 581-1973

THE ISSUES PRESENTED

A. Whether the Court below properly construed Rules 104, 105 and 801(d)(2)(e), F.R.Evid., to allow the Trial Court to make the sole determination of the sufficiency of evidence to establish the existence of a conspiracy so that hearsay declarations of a co-conspirator pertaining to the defendant's alleged involvement would be admissible against anyone other than the declarant.

B. Whether the jury was improperly instructed, and whether such failure to instruct the jury constituted plain error if earlier requests for proper instruction were insufficient to put the duty upon the Trial Court to advise the jury of the proper use of Estes' statements above adverted to, when the Trial Court failed to instruct the jury that a defendant's membership in the alleged conspiracy could only

be determined from evidence of his own acts and conduct and not from the hearsay declarations of co-conspirators.

3. Whether the Court below and the Trial Court erred when they refused to order entry of a judgment of acquittal on behalf of petitioner.

PARTIES TO THE PROCEEDINGS BELOW

In addition to petitioner, this case involved Billie Sol Estes with whom petitioner was accused of conspiring to conceal Estes' assets from the Internal Revenue Service.

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The petitioner, Raymond K. Horton, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceed-

ing on May 28, 1981, rehearing denied on August 7, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at pages 7496-7506 of this Term's slip opinions of that Court and is unofficially reported at 646 F.2d 181. It is reproduced in Appendix A to this petition, post, p. A-1 et seq.

There was no written opinion accompanying the Per Curiam denying a timely petition for rehearing. The Table entry of that ruling has not yet been reported in the Federal Reporter and is not published officially. It is reproduced in Appendix B to this petition, post, p. A-35.

There were no formal written opinions of the United States District Court for the Northern District of Texas, Dallas Division, relevant to this petition. Where

applicable, excerpts of the transcript are reproduced in the Statement of the Case, post, to reflect the rulings made and the reasons therefor in the Trial Court.

GROUNDS ON WHICH JURISDICTION INVOKED

The judgment sought to be reviewed was rendered on May 28, 1981. (Appendix A, infra, p. A-1 et seq.)

A timely petition for rehearing was denied on August 7, 1981. (Appendix B, infra, p. A-35.)

On August 24, 1981, the mandate of the Court below was stayed pending the filing of a petition for a writ of certiorari on or before September 10, 1981. (Appendix C, post, p. A-37.)

On September 14, 1981, pursuant to a motion filed on September 10, 1981, the Court below further stayed the mandate on the same conditions pending the filing of

a petition for a writ of certiorari on or before September 17, 1981.

The questions presented for review herein were raised in the Courts below as indicated in the Statement of the Case, infra. Relevant excerpts of the trial transcript are included in the body of the petition in both the Statement of the Case and the Reasons for A lowing the Writ, infra.

Jurisdiction to review the judgment below is vested by and invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the following provisions of the United States Constitution and the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.

The Sixth Amendment to the Constitution, in relevant part, provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.

Rule 29(a), F.R.Cr.P., in relevant part, provides:

> * * * The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. * * *

Rule 30, F.R.Cr.P., provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. Opportunity shall be given to

make the objection out of the hearing of the jury and, on the request of any party, out of the presence of the jury.

Rule 51, F.R.Cr.P., provides:

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

Rule 52(b), F.R.Cr.P., provides:

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Rule 104(a, b), F.R.Evid., provides:

(a) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Rule 105, F.R.Evid., provides:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 801(d)(2)(E), F.R.Evid., provides:

(d) A statement is not hearsay if--
(2) The statement is offered against a party and is (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

Petitioner and Billie Sol Estes were charged with conspiring to defraud the Government by concealing Estes' assets from the Internal Revenue Service in violation

of 18 U.S.C. §371. The District Court had jurisdiction under 18 U.S.C. §3231.

Three separate interrelated issues are presented by this petition. For purposes of clarity and brevity, the Statement of the Case is subdivided into separate parts relative to each of the issues in dispute.

(A) The hearsay issue. It was alleged that Billie Sol Estes and petitioner conspired to defraud the United States by concealing assets belonging to Estes which were subject to seizure in satisfaction of substantial long-standing tax liens resulting from prior criminal activity of Estes. During the course of the transactions alleged to have involved such a conspiracy, Billie Sol Estes told people that he owned half of the assets of petitioner's various businesses. The record does not disclose a single instance where such a statement

was ever made in petitioner's presence. The statements were made by Estes to persons with whom he was dealing in petitioner's name in order to persuade those persons that he maintained sufficient influence and control over petitioner that they should deal with him and not petitioner directly.

The Fifth Circuit briefly summarized this evidence as follows (646 F.2d at 184):

> In 1977, the government decided to investigate Estes' financial statements, which Estes contended were very minimal. Government agents, acting as potential investors with shady, mafia-like connections, contacted Estes to discuss certain business deals. The government agents recorded their conversations with Estes, both personally and by telephone. A number of these tapes or parts thereof were introduced into evidence at the trial. In these tapes, Estes told the government agents that he had ownershiinstant case, there can be no doubt that Estes' conversations with the agents, which are preserved on tape, comprise evidence that Horton knew that Estes possessed

large amounts of cash and even owned half of one of Horton's companies.

When the first tape recording was placed before the jury, counsel for petitioner sought the following limiting instruction from the Court (3 S.F. 755-756):

> MR. RAVKIND: Prior to the tape being played, I respectfully request the Court to instruct the Jury--I can't remember the particular tape, exactly what's on it--but that any remarks made by Mr. Estes about other persons, specifically Mr. Horton, are hearsay and until some other independent non-hearsay evidence is introduced is not to be taken as asserting the truth, that they are only statements by Mr. Estes. Could I ask the Court to instruct the jury?

The Court, without citing the rule, concluded that the statements were admissible under Rule 801(d)(2)(E), F.R.Evid. Petitioner's request was not based upon the contention that the evidence was not admissible at all but that it was then admissible only against the declarant, Estes. Petitioner's request conformed to the provisions of Rule 105, F.R.Evid. Defense coun-

sel continued to argue for the limiting instruction, after which the Court below refused to so instruct the jury. (3 S.F. 757) The Court then instructed defense counsel to record his reasons for objection outside the presence of the jury. Ibid. When the opportunity therefore arose, defense counsel had the following colloquy with the Court (3 S.F. 768):

> MR. RAVKIND: Your Honor, my second point is the Court has mentioned outside the presence of the Jury the Court would advise me as to what the Court was going to instruct the jury on so-called co-conspirator statements, since no conspiracy has been established yet.
>
> THE COURT: I don't think I have to instruct the Jury on anything any more about that, just make a decision myself as to whether or not the conspiracy exists and when to let the co-conspirator statement in.

Later during tht same colloquy, the following was said (3 S.F. 769-771):

> THE COURT: It's Mr. Estes' statement that he and Mr. Horton are in business together.

MR. RAVKIND: Right.

THE COURT: And that would be admissible to prove the existence of a conspiracy.

MR. RAVKIND: It's hearsay unless there's some non-hearsay evidence of the conspiracy.

* * * * * *

THE COURT: Mr. Estes is a party to the case. What Mr. Estes says is not going to be hearsay.

MR. RAVKIND: Obviously, I'm not going to quarrel with the Court. I'm making my point but this is a classic co-conspirator statement where one conspirator is saying--or one of the defendants is saying to someone else, maybe a police officer, that "I'm in a consiracy with X."

THE COURT: No, "I'm in business with Mr. So-and-so, he and I have a business together."

MR. RAVKIND: But the business is the gist of the conspiracy in this case.

THE COURT: How do you prove they're in business together?

MR. RAVKIND: With something other than hearsay statements by the alleged co-conspirator, I know that. That's the Government's problem, not mine. I think you can get witnesses who have personal knowledge of--

THE COURT: Don't you think Mr. Estes' statements that he's in business with Mr. Horton is an admission by Mr. Estes that he is in business with Mr. Horton?

MR. RAVKIND (Interposing): Mr. Estes, if there were an issue, but it certainly can never be considered in any Court of law as proof that Mr. Horton is in business with him. It's hearsay to Mr. Horton because it's been made by a declarant not under oath and it's being admitted in this Courtroom to prove the truth of that statement against a person who didn't declare it.

The only purpose of the co-conspirator rule is an assumption that they were agents, and, therefore, his statement qualifies as does Mr. Horton's statement. Therefore, you get around the fact--

THE COURT: He's not offering it to prove Mr. Horton is in business with Mr. Estes. Mr. Estes is in business with Mr. Horton.

I understand your objection. I'll overrule it at this time.

The Trial Court thus recognized that the testimony was legally applicable only against Estes but declined to give a limiting instruction pursuant to the petitioner's request.

On the following Monday morning, after a tape recording of Estes was played, the defense asked for a limiting instruction which was given by the Trial Court in a cursory way, such instruction by natural implication applying only to the evidence immediately preceding the request. After the most damaging tape was played, defense counsel again asked the Court to give a limiting instruction (4 S.F. 821):

> MR. RAVKIND: Your Honor, if Your Honor please, respectfully request that the Jury be instructed that the forty or fifty statements made by Mr. Estes that he had a written contract evidencing his fifty per-cent ownership in Mr. Horton's business, that the Jury be instructed that those statements are hearsay to Mr. Horton and only be considered against Mr. Estes.
>
> Furthermore, the excused that he comes up with, about fifteen different ones, why he can't produce that contract, also would be considered against Mr. Estes.
>
> My final objection, Your Honor, I object to the procedure being employed by the Government as it pertains to Mr. Horton's right, that is,

> all these hearsay statements coming in before there's any agreement or any excuses not to produce the agreement or the existence of any conspiracy.
>
> I think that is three separate objections.
>
> THE COURT: I'm going to instruct the Jury that statements made by Mr. Estes on this last tape are admitted against Mr. Estes at this time, the defendant Estes.

Except by negative implication, the Court did not instruct the jury to consider that most damaging evidence only against Estes and not against Horton.

The Government subsequently urged that the existence of the conspiracy and petitioner's membership in it had been proven by Estes' statement, a statement of Horton (which was incorrectly paraphrased), and the performance by Horton of what Estes said he could get him to do. (4 S.F. 894) The defense argued that the statement made by Horton was an innocent statement which did not indicate Horton's

membership in the alleged conspiracy. (4 S.F. 895) Defense counsel argued that Horton's conduct following the pattern Estes said he could get Horton to follow does not prove Horton's membership when the transaction was perfectly legal. (4 S.F. 896-897) The Court of Appeal conceded that the acts of Horton claimed by the prosecution to evidence the conspiracy to conceal assets were all legal activities on their face. 646 F.2d at 185 [3]. The Trial Court stated it believed the Government was adducing some evidence that there was a conspiracy between Estes and Horton. It did not instruct the jury during the remainder of the trial or during the jury charges that it could not consider Estes' declarations and acts as proof of Horton's membership in the alleged conspiracy.

The Court below ruled on the issue of the admissibility of the hearsay evidence as follows (646 F.2d at 185):

> However, standing alone, all the damaging evidence of Estes' conversations are inadmissible. Before Estes' statements could ever be considered by a court, the government must show by a preponderance of the evidence, independent of those conversations, that a conspiracy existed, that Estes and Horton were members of that conspiracy, and that the statements were made during the course of and in furtherance of the conspiracy. United States v. Ocanas, 628 F.2d at 359; United States v. James, 590 F.2d 575, 581 (5 Cir. 1979)(en banc), cert. den., 442 U.S. 917 (1979). See also United States v. Ricks, 639 F.2d 1305 (5 Cir. 1981).
>
> In the present case, the government barely met this threshold requirement. In its appellate brief, the government devotes one page out of twenty four pages of argument to the issue of the sufficiency of the evidence in a trial whose transcript exceeds four thousand pages. The government's main thrust seems to be that the two individuals were involved in a "quite intimate business relationship," implying that Horton must have known of any illegalities committed by Estes.2/ That factor alone is too weak to convict a man of conspiracy to defraud the United States. Mere association with

someone involved in a criminal enterprise is insufficient to prove participation in a conspiracy. United States v. Gutierrez, 559 F.2d 1278, 1280 (5 Cir. 1977). Horton's agreement with Dr. John Estes to leave part of his estate to the latter is hardly evidence of a conspiracy to defraud the government. Horton's desire to give Estes a share of the profits at some undetermined future time is hardly evidence of a conspiracy to defraud the government. Horton's possible involvement in selling allegedly nonexistent chemical cleaners to private individuals is hardly evidence of a conspiracy to defraud the government.

In spite of the weakness of the government's evidence, Horton's orders for Frank Fuell to give Estes large amounts of cash on two occasions, regardless of Horton's claim that Estes did not keep the money, reasonably could show by circumstantial evidence an agreement between the two to divert money to Estes without the government's knowledge. The introduction of that evidence could then reasonably allow the jury to infer criminal motives from the otherwise innocent acts mentijoned above. Thus, we conclude that the government satisfied the burden of showing by a preponderance of the evidence that a conspiracy existed and that Estes and Horton were members of it. Estes' conversations, therefore, were admissible and their believability along with Estes' and Horton's testimony at

trial became matters for the jury to weigh and accept or reject.

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2. Although we find that the government in this case presented enough evidence to allow the introduction of a coconspirator's statements at trial, this court, the district court and the attorneys for the United States should always remain cognizant of the words of Justice Jackson in Krulewitch v. United States, 336 U.S. 440 (1949)(Jackson, J., concurring). In a concurrence joined by Justices Frankfurter and Murphy, Justice Jackson referred to conspiracy as an "elastic, sprawling and pervasive offense." Id., at 445. Conceding that the basic principle of conspiracy is necessary in modern criminal law, Justice Jackson stated that "even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." Id., at 449. In our case today, the government's evidence of a conspiracy minimally met the preponderance of the evidence test which is required to allow coconspirators' statements to go to a jury. We would only caution those who

> present indictments to grand juries by echoing Justice Jackson's remarks that a court should not strain "to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction." Id., at 457.

The above quoted ruling of the Court of Appeals, however, completely ignores the point made by petitioner throughout the trial and on direct appeal that the evidence of Estes' declarations about Horton's membership were admissible only against Estes and were inadmissible hearsay evidence against Horton which could not even be conditionally admitted pursuant to Rule 104(b), F.R.Evid., to prove his membership in the alleged conspiracy.

(B) The jury instruction issue. Throughout the trial, petitioner sought to have the jury instructed that it could not consider the evidence of Estes' declara-

tions about petitioner's involvement with Estes assets against petitioner but that petitioner's membership in the alleged conspiracy could be determined only on the basis of petitioner's own acts and declarations. (3 S.F. 755-756, 768; 4 S.F. 821) The Trial Court expressly informed defense counsel that it was no longer necessary that it instruct the jury that the defendant's membership in a conspiracy can be determined only on the basis of his own acts and declarations and not the declarations of a coconspirator. (3 S.F. 768, quoted ante.) The instruction sought by defense counsel was contained in former Fifth Circuit Pattern Jury Instruction, Criminal Cases, Offense Instruction No. 3A. The Fifth Circuit, in the opinion below, acknowledged that the instruction sought by Horton during the trial, the omission of which in the final jury charg-

es to which petitioner objected on appeal, "no longer exists," 646 F.2d at 186, while acknowledging that principle to still be the law and that such an instruction would have been appropriate if requested. Ibid. The Trial Court had already informed defense counsel that it was no longer necessary to so instruct the jury. (3 S.F. 768) The additional request at the time the jury instructions were to be considered obviously would have been an exercise in futility. The Trial Court had already ruled on the point contrary to petitioner's position at trial. The Fifth Circuit, in United States v. James, 590 F.2d 575 (5 Cir. en banc), cert. den., 442 U.S. 917 (1979), had held that such an instruction was not required and that the question of admissibility of evidence for consideration of the issue of the defendant's membership was strictly a question

for the Court in ruling upon admissibility.

(C) Denial of Judgment of Acquittal

The only conclusive evidence that petitioner held assets belonging to Estes was the inadmissible (as to petitioner) hearsay declarations by Estes of Horton's possession of Estes' assets. Two other "facts" relied upon by the Court below to establish the existence of an petitioner's membership in the alleged conspiracy were that (1) Mr. Frank Fuell testified that petitioner had ordered him to give large sums of cash to Estes, ostensibly for delivery to a man named Barrett as a sales commission (646 F.2d at 184, 185), and (2) when Frank Fuell asked petitioner for Barrett's social security number, petitioner never provided it so that appropriate records could be submitted to the Internal Revenue Service (646 F.2d at 184). The

Court below, while acknowleding that the evidence was weak, held that the Fuell testimony was sufficient to warrant admission of Estes' declarations and that Estes' declarations were sufficient to convict petitioner. Ibid.

Mr. Barrett testified on the trial of this case that he received approximately two-thirds of his commission in the form of a check written by Mr. Fuell. (Tr. 1562-63) Those checks were written in the amount of $2,750.00 and $5,410.00, respectively, one of which was delivered to him by Estes and the other of which was mailed to him by Fuell. (Tr. 1563) Mr. Barrett did not even know petitioner Horton. (Tr. 1538, 1565, 1568-69) Barrett became involved in this matter at Estes' invitation. (Tr. 1543) Barrett's fees were 2 1/2% from the borrower and the same amount from the lender. (Tr. 1561) Bar-

rett's testimony is replete with references to Estes telling him that Horton had agreed to this or that and that Horton had authorized this or that, but there is not any testimony that Barrett ever even spoke to Horton. (Tr. 1537 et seq, passim.) Fuell, on the other hand, did speak with Barrett on the telephone. (Tr. 1569) If Fuell did account to IRS for monies delivered to Barrett as a commission, he had issued two checks to Barrett and should have had his social security number at that time.

Fuell testified that in connection with monies received from leasing companies, he "wrote checks totalling $12,600 and cashed them * * *." (Tr. 1946) He claimed to have given that cash to Estes at petitioner's direction. (Tr. 1948) He claimed that he placed the money in a standard bank envelope used for passing cash

from the teller to a customer at the bank. On crossexamination, when the size of a stack of 126 $100 bills was contrasted with the dimensions of such an envelope, the envelope suddenly became stretched to something between the standard bank envelope and a number 10 business envelope.

On direct examination, Fuell testified that he was told by Estes and Horton that Barrett was to receive a 10% commission on the financing relative to the steam cleaners. (Tr. 1955) He testified that he was told on several occasions that the $12,600 and $13,343 payments represented 10% of the funds received and disbursed from the leasing companies. (Tr. 1956) Fuell testified he had wanted to issue checks to Barrett for the commissions but that Estes had told him the commissions had to be paid in cash. (Tr. 1961, 2125) Significantly, the two payments actually

made to Barrett by Fuell were paid by check. (Tr. 1562-63) The only evidence of these cash payments at all is the testimony of Frank Fuell that he made such payments to Estes. On the checks themselves, they are all noted to be loans to himself from the monies placed in trust with him by petitioner in connection with the steam cleaner transactions.

Petitioner was charged with attempting to defraud the Government by concealing Estes' assets from the I.R.S. Substantial evidence was adduced that Estes told many people, including Horton, that he could not own anything in his own name because of a condition of parole. The agreement that Horton should hold Estes' portion of the profits from the various business dealings between them, if that was ever shown to have existed, was shown at most to have been for the purpose of with-

holding information from the parole authorities and not to defraud I.R.S. Estes' representations about why he could not own anything in his own name, while untrue, were never shown by the evidence to have been known by petitioner not to have been the true reason for the agreements allegedly reached between petitioner and Estes that petitioner commingle Estes' assets with his own and disburse those assets according to Estes' directions at a later time.

In addition to the absence of proof of petitioner's membership in the alleged conspiracy with Estes, there was no proof that petitioner and Estes conspired to conceal Estes' assets from I.R.S. and thus deprive the Government of funds to collect in satisfaction of the tax liens against Estes.

REASONS FOR ALLOWING THE WRIT

1. **This case presents a substantial question of federal evidentiary law, frequently arising in criminal conspiracy prosecutions, which has not been decided by this Court since the Federal Rules of Evidence have been effective but previous decisions of this Court were contrary to the interpretation being placed on the Rules relative to co-conspirators' declarations, and an evolving body of opinion from other Circuits, as well, misapplies the relevant Rules to reach an unfair result in conspiracy cases.**

The decisions of the First and Fifth Circuits, in United States v. Petrozziello, 548 F.2d 20 (1 Cir. 1977), and United States v. James, 590 F.2d 575 (5 Cir. en banc), cert. den., 442 U.S. 917 (1979), are representative of the body of jurisprudence developing in federal criminal conspiracy cases and are the most often cited or quoted as authority for the proposition that no limiting instruction relative to the use of an alleged co-conspirator's hearsay declarations implicating a defendant need be given during the

trial or during the final instructions to the jury after the Trial Court has considered the evidence and made a determination that there is a preponderance of evidence to establish the existence of a conspiracy and defendant's membership in it.

Prior to the Petrozziello and James decisions, the Fifth Circuit Pattern Jury Instructions for Criminal Cases, Offense Instruction No. 3A (WEST 1979), provided on page 62 for the giving of the following instruction to the jury in criminal conspiracy cases:

> In determining whether a Defendant was a member of an alleged conspiracy, however, the jury should consider only tht evidence, if any, pertaining to his own acts and statements. He is not responsible for the acts or declarations of other alleged participants until it is established beyond a reasonable doubt, First, that a conspiracy existed and, Second, from evidence of his own acts and statements, that the Defendant was one of its members.

See, also, Id., Trial Instruction No. 2, p. 163. The jurisprudence of this Court had indicated the necessity for trial judges to limit the use of hearsay declarations of alleged co-conspirators until the existence of the conspiracy and the membership of the declarant and the accused had been proven. Cf. Blumenthal v. United States, 332 U.S. 539, 546-547, 550-553 (1947), reh. den., 332 U.S. 856 (1948).

Following the Petrozziello and James cases, which purported to construe the relevant Federal Rules of Evidence, the courts took from the jury the obligation to limit consideration of a defendant's membership in an alleged conspiracy to evidence of his own acts and declarations and permitted the jury to use such evidence to determine membership if the Trial Court, upon a preponderance of the

evidence, finds the existence of sufficient evidence to establish a conspiracy and the membership of both the defendant and the declarant. Under the procedure evolving from the interpretation of Rules 104 (a) and (b) and Rule 801(d)(2)(E), F.R.Evid., made in Petrozziello and James, the Court makes the initial (and only) determination of the membership of the defendant based on evidence independent of the co-conspirator's declaration and subsequently instructs the jury that it may consider against all defendants found to be members of the conspiracy the acts and declarations of other persons likewise found to have been co-conspirators. Under the evolving practice, the trial courts conditionally receive the hearsay declarations of co-conspirators, even those statements which do no more than to declare the defendant's membership

during the conspiracy for whatever purpose the declarant may then have had, and it then determines the existence of the operative facts upon which admission is conditioned and never instructs the jury that it is limited in the use of such evidence and cannot use it to establish the membership of any person other than the declarant. Such practices have been justified upon various bases, ranging from what the lower courts have perceived to be the correct application of Rule 104(b), F.R.-Evid., in conjunction with Rule 801(d)(2)-(E), F.R.Evid., that the co-conspirator's declarations are "non-hearsay," Petrozziello and James, supra, all the way through the determination that the application of such complex reasoning is unnecessary, confusing and more burdensome to the Government than the law requires. United States v. Enright, 579 F.2d 980, 986 (6

Cir. 1978). Some courts, contrary to the teaching of this Court in Glasser v. United States, 315 U.S. 60, 74-75, reh. den. 315 U.S. 827 (1942), have held that the trial court, pursuant to Rule 104(a), F.R.-Evid., may even consider the co-conspirator's hearsay declaration to determine, by a preponderance of the evidence, that the accused was implicated in the alleged conspiracy, thus satisfying the conditions for admission under Rule 104(b), F.R.-Evid., and thus thoroughly short circuited the jury's obligation to determine a person's guilt on the basis of his own acts and declarations. E.g., see United States v. Martorano, 557 F.2d 1, 11 (1 Cir. 1977), cert. den., 435 U.S. 922 (1978).

The jurisprudence which has evolved under the Petrozziello and James cases hs, for the most part, completely ignored

Rule 105, F.R.Evid., which recognizes that evidence may be admissible as to only one party or for a limited purpose and establishes a procedure for instructing the jury to restrict the evidence to its proper scope. The declaration of a co-conspirator cannot be considered as proof of another's membership in the alleged conspiracy. Glasser v. United States, supra, at 74-75; United States v. Fellabaum, 408 F.2d 220 (7 Cir. 1969); United States v. Spock, 416 F.2d 165 (1 Cir. 1969). Under the Blumenthal rationale, the trial court must restrict the use of co-conspirators' declarations to consideration only of the membership of the declarant in the alleged conspiracy which has been proven to exist by non-hearsay evidence. The Rule 801(d)(2)(E) declaration that co-conspirators' declarations are non-hearsay should not be considered suffi-

cient to warrant bootstrapping the determination of admissibility upon the very statement sought to be admitted. That is not the type of non-hearsay evidence to which the co-conspirator exception to the hearsay rule relates.

In effect, the above procedure which is evolving and has in some manner or another touched the jurisprudence of nearly every Circuit is unconstitutional in that it deprives an accused of his Sixth Amendment constitutional right to have the jury determine his guilt on the basis of its finding, beyond a reasonable doubt, the existence of every essential element. By withdrawing from the jury the obligation to determine an accused's membership on the basis of his own acts and declarations, the procedure allows the judge to instruct the jury to find defendant to be a member if the jury finds sufficient hear-

say (Rule 801(d)(2)(E) non-hearsay) evidence to implicate the accused. Such a procedure is also unfair and unconstitutional because the trial judge need only find the existence of evidence sufficient to satisfy the preponderance standard, whereas membership in the conspiracy is an essential element of the offense and is constitutionally required to be found on the basis of evidence sufficient to satisfy the reasonable doubt standard of proof. Jackson v. Virginia, 443 U.S. 307 (1979); In re Winship, 392 U.S. 358, 364 (1970).

As shown in the Statement of the Case, ante, defense counsel requested interim limiting instructions with regard to Estes' numerous declarations that he owned half of petitioner's business and controlled the operations of various businesses belonging to petitioner. The Court not

only refused such instructins but informed defense counsel that under the James case it was no longer required to convey the concept to the jury at all. The Court of Appeals, even having been shown that the trial court had so stated its position which defense counsel then treated to be the law of the case adequately preserved for appellate review, faulted defense counsel for not further insisting upon an instruction at the conclusion of the trial which would have required the jury properly to base its finding of petitioner's membership solely upon petitioner's acts and declarations. While we believe that the trial court's declaration that such instructions were no longer necessary during the trial excused the failure of trial counsel to insist upon proper instruction of the jury at the conclusion of the evidence, accord Rule 51, F.R.-

Cr.P., and that such error permitted conviction upon proof less than sufficient to meet the reasonable doubt standard was "plain error," Rule 52(b), F.R.Cr.P.; Rule 103(d), F.R.Evid., there is no need to resort to the plain error rule to require reversal for the failure to properly instruct the jury pursuant to Rule 105, F.R.-Evid., on the limited purpose for which Estes' declarations implicating the petitioner could be considered. Objections were repeatedly made about that. This concept was never conveyed to the jury and it is impossible to conclude that the jury did not utilize such evidence to determine petitioner's membership in the alleged conspiracy. Even the Court of Appeals could not verbalize a basis for finding the evidence to be sufficient without resorting to the declarations of Estes implicating petitioner.

This Court, in the interest of justice in the instant case and for the purpose of providing guidance to the lower courts respecting how to handle co-conspirator's declarations under the scheme of the Federal Rules of Evidence, viz., still as in Blumenthal or as in Petrozziello and James have construed the Rules, should grant a writ of certiorari and review the opinion and judgment of the Court below.

2. The Court below has decided this case in a manner conflicting with applicable decisions of this Court, particularly Jackson v. Virginia and In re Winship, and this Court should grant a writ of certiorari to require conformance to those precedents by the Court below in this case.

The Court below, in its discussion of the admissibility of Estes' declarations implicating the petitioner, said (646 F.2d at 185):

> * * * Before Estes' statements could ever be considered by a court, the government must show by a prepon-

> derance of the evidence, independent of those conversations, that a conspiracy existed, that Estes and Horton were members of that conspiracy and that the statements were made during the course of and in furtherance of the conspiracy. [Citations omitted.]
>
> In the present case, the government barely met this threshold requirement. In its appellate brief, the government devotes one page out of twenty four pages of argument to the issue of the sufficiency of the evidence in a trial whose transcript exceeds four thousand pages. * * * [Emphasis added.]

The Court below also noted that in this case "the government's evidence of a conspiracy minimally met the preponderance of the evidence test * * *." 646 F.2d at 185 n. 2. The Court below noted the "weakness of the government's evidence" to meet even under the preponderance standard the threshold requirement for admitting Estes's declarations and relied upon the evidence of Estes' declarations to establish the petitioner's membership in the alleged conspiracy when considering petitioner's

entitlement to acquittal under Rule 29(a), F.R.Cr.P.

Obviously, the declarations of Estes that Horton possessed huge assets belonging to Estes and that Estes owned half of Horton's business were inadmissible to prove Horton's membership in a conspiracy. Such statements were required to be restricted in their use to a determination of Estes' membership in the alleged conspiracy. Blumenthal v. United States, supra; United States v. Fellabaum, supra; United States v. Spock, supra. If the independent evidence was barely sufficient to meet the preponderance standard, it obviously fell far short of meeting the reasonable doubt standard required for conviction in a criminal case. Jackson v. Virginia, supra; In re Winship, supra.

Besides the essential element of membership, the Government's proof fell far short on the issue of the existence of the conspiracy alleged in the indictment. The indictment alleged that petitioner and Estes conspired to conceal assets from the Internal Revenue Service to avoid seizure of those assets in satisfaction of outstanding tax liens put against Estes. All of the evidence adduced on the trial of this case showed that Estes told everyone that he could not own anything in his own name because that was a condition of his parole. There is no evidence that he told petitioner differently or that petitioner knew that the purpose of Estes' concealment of his ownership was to avoid seizure of the property to satisfy the tax liens. Obviously, Estes and petitioner did not have the same objective, hence did not con-

spire to defraud the I.R.S. as alleged in the indictment.

The Court below made reference to the alleged failure of petitioner to tell Frank Fuell Mr. Ray Barrett's social security number was evidence of the effort to funnel monies to Estes which were not declared to the I.R.S. Putting aside the inssue of Mr. Fuell's credibility (he was the only source of such evidence), that evidence put in its proper context is clearly insufficient to warrant a verdict based upon the reasonable doubt standard of proof.

The evidence shows that Mr. Barrett dealt with Fuell and Estes and never met or talked with petitioner. The evidence also shows that Barrett's commission was 2-1/2 percent of the sale of certain steam cleaners but that petitioner was told it ws 10% and he paid that amount. The evi-

dence shows that Estes, not petitioner, directed Fuell to pay the bulk of Barrett's commission in cash but that nearly all of Barrett's real commission was paid by Fuell to Barrett by checks drawn against Fuell's account. If the evidence is not clear that Estes, and possibly Fuell, were conspiring to defrand petitioner of the 7-1/2% difference between Barrett's actual commission and the representation made by Estes as to the amount thereof, it was such that no reasonable jury could have concluded beyond a reasonable doubt that the funnelling of these funds to Estes in that manner was known by petitioner, much less done in furtherance of the objective of defrauding the I.R.S.

Because the Court below has totally disregarded the burden of proof imposed by the Constitution upon the prosecution and has affirmed the verdict on the basis of a

preponderance of proof of defendant's membership which the Court below even concedes was minimally sufficient to establish membership by the preponderance standard, this Court should grant a writ of certiorari and require the Court below to conform to the mandate of this Court, issued in Jackson and Winship, that it reverse any judgment based on evidence insufficient to establish to a reasonable jury the petitioner's guilt beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES A. MC PHERSON
Attorney for Petitioner
McPHERSON & ZAINEY
419 Carondelet Street
New Orleans, LA 70130

Telephone [504] 581-1973

CERTIFICATE OF SERVICE

I, James A. McPherson, attorney for the petitioner herein, being a member of the Bar of the Supreme Court of the United States, do hereby certify that, on the ____ day of September, 1981, I served copies of the Petition for a Writ of Certiorari, by mailing 5 copies thereof in duly addressed envelopes with air mail postage prepaid, to the Solicitor General of the United States, United States Department of Justice, Washington, D.C., said copies having been placed in the United States Post Office in the 700 block of Loyola Avenue, New Orleans, Louisiana, on the date aforesaid.

All parties required to be served have been served.

JAMES A. MC PHERSON
Attorney at Law

APPENDIX A

(646 F.2D 181)

UNITED STATES of America,

Plaintiff-Appellee,

v.

Raymond K. HORTON and Billie Sol Estes, Defendants-Appellants.

Nos. 79-5444, 79-5477

United States Court of Appeals,
Fifth Circuit.
Unit A

May 28, 1981.

Appeals from the United States District Court for the Northern District of Texas.

Before RUBIN and GARZA, Circuit Judges, and SUTTLE*, District Judge.

GARZA, Circuit Judge.

In the early 1960's Billie Sol Estes was convicted of tax fraud and served a number of years in prison. One of the conditions of his parole from prison was that he would not engage in any promotional activities. Estes still has a federal tax liability which numbers in the tens of millions of dollars.

In the present case, Estes was convicted of one count of creating a scheme and artifice to defraud and to obtain money by means of false pretenses in violation of 18 U.S.C. §1341. He was sentenced to five years on this conviction. At the same time, Estes and the appellant Raymond K. Horton were convicted of conspiracy to defraud the United States by concealing assets from the Department of the Treasury in violation of 18 U.S.C. §§ 371 and 2. Estes was sentenced to a term of five

years to run consecutively to the sentence in the case mentioned above. Horton was sentenced to three years confinement and a fine of $10,000. On the same day as sentencing, Estes was taken into custodfy on a warrant for violation of his parole.

The basis of the first conviction involved a transaction engineered largely by Estes to purchase an electronics company with other people's money. The appellant Horton was not involved in any way in this case. The purchase plan in itself would have been no grounds for criminal action except that Estes and a woman named Sue Goolsby, who later pled guilty, apparently forged one of the investor's signatures on financial statements, guarantees and lease agreements. In addition to that, Estes persuaded another investor to contribute a sizeable amount of money in a petroleum company, after which the funds were divert-

ed to infuse the electronics company with much needed cash. This same investor later made a loan to this electronics firm. He never received any return whatsoever on his investment.

In the concealment of assets case, in which Horton and Estes were convicted of conspiracy, the government alleged that Horton and Estes had been involved in ventures which funneled money to Estes without the knowledge of the Internal Revenue Service. The government contended that Estes was concealing these funds to prevent the IRS from obtaining a portion of the income to offset the huge tax liability of Estes. Horton was a successful businessman who had made his money in oil but was attempting to branch out into other areas of business. At the time of his difficulties with Estes and the government, Horton

was, at least on paper, a multimillionaire.

Upon Estes' release from prison in 1971, Horton discussed working with Estes on business transactions and later hired Estes to help work out deals solely for Horton's benefit. Horton paid Estes a salary of about $700 a month. Horton entered certain business arrangements in which Estes had assisted him, and Horton desired to give Estes a percentage of any profit at some later date when such an arrangement would be legal for Estes. Horton also entered an agreement with Estes' brother, Dr. John Estes, in which the latter would receive upon Horton's death, one-half of that amount of Horton's estate which exceeded three million dollars. John Estes then placed this right in a trust for the benefit of Billie Sol Estes' children. The evidence clearly shows that

such an arrangement standing alone was completely legal, although Horton's attorney believed it did not amount to good business sense.

In 1974 and 1975, Horton purchased a chemical cleaning manufacturing business. The firm was to assemble high pressure chemical cleaners that would clean oil field equipment. While involved in this business, Horton directed that certain monies from the sale of the cleaners, which incidently were non-existent, be given to Billie Sol Estes in hundred dollar denominations. The man delivering this money to Estes, Frank Fuell, was told by Horton that Estes would then convey the money to a man named Barrett as a sales commission. Fuell repeatedly asked for Barrett's social security number for tax and accounting purposes, but Horton never gave it to him. Barrett testified for the government

during which he stated that he did receive partial payment on his commission, but that it had been paid by check.

In 1977, the government decided to investigate Estes' financial statements, which Estes contended were very minimal. Government agents, acting as potential investors with shady, mafia-like connections, contacted Estes to discuss certain business deals. The government agents recorded their conversations with Estes, both personally and by telephone. A number of these tapes or parts thereof were introduced into evidence at the trial. In these tapes, Estes told the government agents that he had ownership rights in Horton's business, that he knew how to handle Horton and that he in effect controlled Horton. Estes also told the agents that his actual worth was very high but that his money was kept in the name of someone

else since he was not allowed to have it in his own name. Estes also promised to obtain a contract from Horton in which Horton would pledge fifty one percent of his company, of which Estes claimed he owned one-half. In this transaction, Estes had told the government agents not to talk to Horton about the deal and that Estes could take care of it. When the agents subsequently called Horton, however, Horton told them that Estes could sign no contract and that nothing could be worked out until Horton agreed. The contract was eventually signed by Horton placing the collateral in the name of a nominee.

Both appellants now raise a number of grounds of error. Horton contends that the evidence was insufficient to convict him of conspiracy, that the trial court erred in failing to make a determination as to the admissibility of statements made

by Estes, that the trial court erred in its jury charge and that the trial court's failure to order a severance was error. Estes claims on appeal that his case should have been dismissed either for prosecutorial vindictivenes, violation of the Speedy Trial Act or for refusing to enforce a plea bargain agreement. Estes also contends that he was denied a fair trial since one of the jurors was allegedly prejudiced by the media and that the court erred in amending his sentence outside of his presence and without a hearing.

Horton and Estes were convicted of conspiracy to defraud the United States pursuant to 18 U.S.C. §371.[1] Specifically, the two were accused of impeding the Department of the Treasury from collecting back taxes by means of the concealment of the assets. Only Horton challeng-

es the sufficiency of the evidence. The evidence is insufficient when a reasonably minded jury must necessarily entertain a reasonable doubt as to the defendant's guilt under the evidence. United States v. Ocanas, 628 F.2d 353, 360 (5 Cir. 1980).

In order to find that Horton was a member of the conspiracy, the government must have shown beyond a reasonable doubt, if only by circumstantial evidence, that a conspiracy existed, that Horton knew of it and that he intended to associate himself with the objectives of the conspiracy. United States v. Caicedo-Asprilla, 632 F.2d 1161, 1166 (5 Cir. 1980). In the instant case, there can be no doubt that Estes' conversatins with the agents, which are preserved on tape, comprise evidence that Horton knew that Estes possessed

large amounts of cash and even owned half of one of Horton's companies.

However, standing alone, all the damaging evidence of Estes' conversations are inadmissible. Before Estes' statements could ever be considered by a court, the government must show by a preponderance of the evidence, independent of those conversations, that a conspiracy existed, that Estes and Horton were members of that conspiracy and that the statements were made during the course of and in furtherance of the conspiracy. United States v. Ocanas, 628 F.2d at 359; United States v. James, 590 F.2d 575, 581 (5 Cir. 1969)(en banc), cert. den., 442 U.S. 917 (1979). See also United States v. Ricks, 639 F.2d a305 (5 Cir. 1981).

In the present case, the government barely met this threshold requirement. In its appellate brief, the government de-

votes one page out of twenty four pages of argument to the issue of the sufficiency of the evidence in a trial whose transcript exceeds four thousand pages. The government's main thrust seems to be that the two individuals were involved in a "quite intimate business relationship," implying that Horton must have known of any illegalities committed by Estes.[2] That factor alone is too weak to convict a man of conspiracy to defraud the United States. Mere association with someone involved in a criminal enterprise is insufficient to prove participation in a conspiracy. United States v. Gutierrez, 559 F.2d 1278, 1280 (5 Cir. 1977). Horton's agreement with Dr. John Estes to leave part of his estate to the latter is hardly evidence of a conspiracy to defraud the government. Horton's desire to give Estes a share of the profits at some undeter-

mined future time is hardly evidence of a conspiracy to defraud the government. Horton's possible involvement in sellin allegedly non-existent chemical cleaners to private individuals is hardly evidence of a conspiracy to defraud the government.

In spite of the weakness of the government's evidence, Horton's orders for Frank Fuell to give Estes large amonts of cash on two occasions, regardless of Horton's claim that Estes did not keep the money, reasonably could show by circumstantial evidence an agreement between the two to divert money to Estes without the government's knowledge. The introduction of that evidence could then reasonably allow the jury to infer criminal motives from the otherwise innocent acts mentioned above. Thus, we conclude that the government satisfied the burden of showing by a preponderance of the evidence that a con-

spiracy existed and that Estes and Horton were members of it. Estes' conversations, therefore, were admissible and their believability along with Estes' and Horton's testimony at trial became matters for the jury to weigh and accept or reject.

Horton's second challenge regards the trial court's alleged failure to make a determination as to the admissibility of statements of an alleged coconspirator, namely Estes. During the testimony of the main government witness, the judge ruled that the government was coming forward with evidence showing a relationship between Horton and Estes. At the close of the evidence, Horton sought a judgment of acquittal, based largely on the hearsay evidence. The judge overruled this motion. Although the trial court did not specifically say that there was sufficient independent evidence, it is clear that his com-

ments during the government's case and his overruling of the defendant's various motions involving the hearsay objection, show that the trial court found there to be sufficient independent evidence of the conspiracy and that Horton and Estes were involved in it.

Horton also alleges that the trial court erred in failing to give a certain charge. No objection was made at the time of the instuction, and so this court may reverse only if plain error exists. United States v. Berrojo, 628 F.2d 368, 370 (5 Cir. 1980). The trial court gave a completely adequate instruction on the law of conspiracy. In fact, the trial court adhered to the instructions recommended by the District Judges Association for the Fifth Circuit in its manual on pattern jury instructions. See Pattern Jury Instructions for the Fifth Circuit, Offense

Instruction 3A (March 1, 1979). Horton concedes this point but contends that the trial court failed to give an instruction which he alleges is also in the Fifth Circuit Pattern Jury Instruction manual.

The Fifth Circuit pattern jury instruction to which Horton refers no longer exists. Horton does contend, though, that included in that instruction was a charge which cautioned that a jury could only determine an alleged coconspirator's involvement from evidence of his own acts and statements. The trial judge in this case did not include such a charge. Neither defendant objected to this omission at trial. Although the trial court could have included such an instruction, its absence did not prejudice either defendant and does not amount to plain error. See United States v. Calarco, 424 F.2d 657,

661 (2 Cir. 1970), cert. den., 400 U.S. 824 (1970).

Horton finally contends that the trial court erred in failing to grant a severance, which was requested a number of times throughout the trial. Horton claims that the seveance should have been granted for any one or all of four reasons: (a) antagonistic defenses; (2) the trial court's excusal, over objection, of jurors who might have been prejudiced against Estes but knew nothing of Horton; (3) references to Estes' prior guilty plea involving some of the charges in this case; (4) introduction of hearsay evidence contrary to United States v. James.

It must be remembered that the granting or denial of a motion for severance is in the discretion of the trial court, United States v. Salomon, 609 F.2d 1172, 1175 (5 Cir. 1980), and appellate courts

are hesitant to second guess a trial court's refusal to grant a severance. United States v. Marino, 617 F.2d 76, 83 (5 Cir. 1980). Severance should only be granted if the appellant can show that he was unable to obtain a fair trial without a severance and that he can demonstrate compelling prejudice which the trial court could not alleviate. United States v. Crawford, 581 F.2d 489, 491 (5 Cir. 1978). Severance is allowable when antagonistic defenses are present, but the conflict must reach a point where the defenses are irreconcilable and mutually exclusive. Id. The defenses in this case never reached that level. One indication of the lack of antagonistic defenses was that both defendants testified and denied culpablity. See United States v. Andrew, 606 F.2d 549, 550 (5 Cir. 1979). A thorough reading of the record convinces

this court that the defenses were not antagonistic and, in fact, were extremely consistent.

Horton's challenge concerning Estes' guilty plea is equally not grounds for severance. Estes had entered a plea bargain agreement earlier in the litigation but withdrew it upon recommendation of the court. The government never introduced any evidence regarding this guilty plea due to the court's ruling that it was inadmissible. It was originally mentioned in Estes' opening argument and mentioned again by Horton's counsel when questioning members of Estes family. The trial judge also instructed the jury as to the presumption of the defendants' innocence and that each defendant was to be tried separately on only the evidence against him. This court is satisfied that no undue prejudice attached to Horton because of the mention-

ing of Estes' guilty plea. The fact that the trial court may not have given a specific instruction as to the effect of the guilty plea on both defendants does not amount to reversible error since apparently no such instruction was ever requested and there were no additional aggravating circumstances that might have forced the trial court to give such a specific instruction on its own. See United States v. DeLucca, 630 F.2d 294, 299 (5 Cir. 1980).

The court has already ruled that the introduction of Estes' statements was correct and, thus, cannot be a ground for severance. This court finds equally unacceptable Horton's argument regarding the excusal of jurors that were not specifically prejudiced against Horton but were possibly prejudiced against Estes. A defendant does not have a right to a specific juror

but only to a fair and impartial one. Since the two defendants were rightly tried together, the occurrence in this case regarding such jurors is a potential and often likely one. We find no error in the court's refusal to grant a severance on this point.

Estes contends that his motion to dismiss and plea in bar of prosecution should have been granted by the government on the grounds of prosecutorial vindictiveness and impropriety. Estes' basis for this charge is that the government threatened the bringing of indictments against members of his family. Estes also relies upon the government's agreement not to seek indictments in return for his guilty plea, but the government did not uphold its part of the bargain by using its best efforts to obtain approval of the agreement from the United States Parole Commission and

that the government then vindictively caused the return of a number of indictments against him in place of the one-count guilty plea.

This court finds that there was no prosecutorial vindictiveness or bad faith. First, there is no violation of the defendant's rights when the government brings more serious charges against the defendant after he has decided not to plead guilty to a lesser charge provided the defendant knew that those more serious charges existed at the time of the plea bargain. Bordenkircher v. Hayes, 434 U.S. 357, 360 (1978); United States v. Ocanas, 628 F.2d at 358. In the instant case, Estes was well aware at the time of his plea agreement of the existence of the charges that were inevitably brought against him. This court finds no impropriety in the government's warnings that members of his fam-

ily could be indicted as well. As to the government's agreement vis a vis the Parole Commission, the government agreed that it would:

> recommend to the United States Parole Commission that Billie Sol Estes' parole be revoked for technical violations of the terms of his parole for a period commencing with the beginning date of any sentence imposed hereunder and ending no later than the date of the expiration of his present parole, and will further recommend that the parole not be revoked for a period of time commencing with the date that Billie Sol Estes was released from the Federal Corrections Institution; and that Billie Sol Estes be sentenced after the United States Parole Commission has acted on this recommendation....

The plea bargain also stipulated that if the Parole Commission failed to accept and act on the United States Attorney's recommendation, the agreement would be null and void. The government also agreed not to object to any release on parole of Estes. The government did make contact with the Parole Commission on this matter

according to the plea agreement. The Parole Commission, however, decided to delay any decision until after the sentencing of Estes. The district court then held that the agreement was unenforceable since the government could not bind the Parole Commission. The court then allowed Estes to withdraw his plea, which he did. The government upheld its part of the agreement, and this court finds no breach of that agreement.

Estes' alternative challenge on this point concerns an alleged violation of the Speedy Trial Act, 18 U.S.C. §§3161-3174. This court finds no violation of the Speedy Trial Act, and further finds that even if there had been a violation, dismissal would not be required since that sanction found in 18 U.S.C. §3162 did not become effective until over a year after the trial on this case began in June of 1979.

See 18 U.S.C. §3162(c) (sanctions imposed for violations of the act "become effective and apply to all cases commenced by arrest or summons, and all informations or indictments filed, on or after July 1, 1980.")

Estes' second alternative challenge on this point concerns alleged error by the court in refusing to enforce the plea bargain. Estes contends again that the government did not use its best effort to satisfy the terms of the agreement. A thorough review of the record convinces this court that the government did correspond with the Parole Commission to effectuate the terms of the agreement. These efforts by the government resulted in a recommendation by the commissioner of the Parole Commission, Dr. William E. Amos, that the Parole Commission follow the recommendation of the government according to the

plea agreement. Therefore, Estes' challenges regarding his motion to dismiss and plea in bar of prosecution are without merit.

Estes next contends that the trial court should have granted his motion for a new trial on the ground of juror misconduct. One of the jurors contended that he was influenced by the media to such an extent that he believed he was the only one who considered Estes not guilty. Throughout the trial, the court had admonished the jurors not to read or listen to news accounts of the trial. A hearing was held on the motion for new trial. The trial court examined all the matters raised at the hearing and determined that no specific evidence was presented which could indicate grounds for influencing the juror. Finding no such evidence, the court determined that there had been no actual preju-

dice and denied the motion for a new trial.

The determination of the existence of juror prejudice is within the sound discretion of the court. United States v. Goodman, 605 F.2d 870, 882 (5 Cir. 1979). Each claim of juror prejudice must turn on its own facts, id., and to satisfy his burden the defendant must show an actual identifiable prejudice attributable to publicity surrounding the trial on the part of a member of the jury. Mayola v. State of Alabama, 623 F.2d 992, 996 (5 Cir. 1980). In the instant case, the trial judge discounted the testimony of the juror and failed to find any prejudice in the publicity to which Estes referred during the hearing. The juror himself was not able to point to any specific publicity during the trial. On this basis, we find that there was no abuse of discretion by

the trial court in denying the motion for a new trial.[3]

Estes' last challenge concerns alleged error in sentencing by the trial judge. As already mentioned, the trial judge sentenced Estes to consecutive terms of five years. On the same date, Estes was taken into custody on a parole violator's warrant. The government then filed a motion seeking a clarification as to whether the above sentence would run concurrently or consecutively to any sentence Estes might receive upon the revocation of his parole. Shortly thereafter, the trial court ordered that Estes' ten-year sentence shall run consecutively to any sentence he might receive as a result of parole revocation. Estes contends on appeal that his punishment has been enhanced without his being present and without a hearing. Estes points out that the warrant

for his parole violation was issued subsequent to his sentencing in this case. Further, the court's order clarifying this point was entered nearly one month after Estes was to report to the marshal's custody.

Although this court believes that Estes may have a valid argument on this point, see, e.g., Causey v. Civiletti, 621 F.2d 691, 693 n. 2 (5 Cir. 1980) (in the absence of dispositive language in the sentencing order, there is a general presumption that sentences are to run concurrently); Schultz v. United States, 384 F.2d 374, 375 (5 Cir. 1967) (increasing a sentence after defendant has commenced to serve it is a violation of double jeopardy), we believe that the issue should be raised initially in the trial court on a motion for reduction of sentence pursuant to Rule 35 of the Federal

Rules of Criminal Procedure.[4] See United States v. Weiner, 418 F.2d 849, 851 (5 Cir. 1969).

In summary, after a thorough reading of the record and examination of the exhibits, this court finds no error in the conviction of the appellants and affirms the trial court's judgment. The case is remanded solely to allow Estes to present his motion for reduction of sentence pursuant to Rule 35.

AFFIRMED AND REMANDED WITH INSTRUCTIONS.

FOOTNOTES

* District Judge for the Western District of Texas, sitting by designation.

1. 18 U.S.C. §371 makes it a crime:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy . . . .

2. Although we find that the government in this case presented enough evidence to allow the introduction of a coconspirator's statements at trial, this court, the district court and the attorneys for the United States should always remain cognizant of the words of Justice Jackson in Krulewitch v. United States, 336 U.S. 440 (1949)(Jackson, J., concurring). In a concurrence joined by Justices Frankfurter and Murphy, Justice Jack-

son referred to conspiracy as an "elastic, sprawling and pervasive offense." Id., at 445. Conceding that the basic principle of conspiracy is necessary in modern criminal law, Justice Jackson stated that "even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." Id., at 449. In our case today, the government's evidence of a conspiracy minimally met the preponderance of the evidence test which is required to allow coconspirators' statements to go to a jury. We would only caution those who present indictments to grand juries by echoing Justice Jack-

son's remarks that a court should not strain "to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction." Id., at 457.

3. Additionally, under Rule 606(b) of the Federal Rules of Evidence, although a juror may testify as to whether extraneous prejudicial information was improperly brought to his attention, a juror is incompetent to testify as to the effect of anything upon his mind as influencing him to assent to the verdict. Regardless, then, of whether any information was improperly brought to the juror's attention, Rule 606(b) would render incompetent

his testimony that he was influenced by newspaper accounts.

4. Rule 35 of the Federal Rules of Criminal Procedure provides in pertinent part:

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided for the reduction of sentence.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

NO. 79-5444

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAYMOND K. HORTON, and
BILLIE SOL ESTES,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

(August 7, 1981)

Before RUBIN and GARZA, Circuit Judges, and SUTTLE*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Raymond K. Horton in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Reynaldo G. Garza
United States Circuit Judge

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*District Judge for the Western District of Texas, sitting by designation.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

NO. 79-5444

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAYMOND K. HORTON, and
BILLIE SOL ESTES,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

O R D E R

( ) * * * * * * * *

(X) The motion of appellant, Raymond K. Horton, for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including September 10, 1981, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the

period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) * * * * * * * *

( ) * * * * * * * *

Reynaldo G. Garza
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

NO. 79-5444

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAYMOND K. HORTON, and
BILLIE SOL ESTES,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

O R D E R:

( ) * * * * * * * *

( ) * * * * * * * *

(X) The motion of appellant, Raymond K. Horton, for a further stay of the issuance of the mandate is GRANTED to and including September 17, 1981, und-

er the same conditions as set forth in the preceding paragraph.

( ) * * * * * * * *

Reynaldo G. Garza
United States Circuit Judge